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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JESUS GUILLERMO MARTINEZ, Defendant and Appellant.	B287389 (Los Angeles County Super. Ct. No. MA072079)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed.

Jenny Brandt, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jesus Martinez grabbed his two young children by the arms and pulled them across a busy thoroughfare to avoid speaking to a sheriff's deputy. Traffic stopped short to avoid them. A few hours later, defendant ran away from his children to evade different deputies, who eventually arrested defendant with some difficulty. A jury found him guilty of two counts of felony child endangerment and other misdemeanors not relevant to this appeal. The trial court sentenced defendant to consecutive terms for the child endangerment counts.

In this appeal, defendant contends that the child endangerment convictions should be reversed. He argues that there was insufficient evidence that he exposed his children to conditions likely to cause great bodily injury, or that he acted with criminal negligence. Defendant also challenges the court's imposition of consecutive sentences on the child endangerment counts, on the ground that the court failed to recognize its discretion to run the sentences concurrently. The Attorney General agrees that the court failed to recognize its discretion, but contends no remand is necessary because it is not reasonably probable that the court would have imposed a concurrent sentence. We conclude that the record supports defendant's convictions and sentence, and affirm.

PROCEDURAL HISTORY

A five-count information charged defendant with two counts of felony child endangerment (Pen. Code, § 273a, subd. (a)),[1] one count of misdemeanor vandalism (§ 594, subd. (a)), one count of misdemeanor resisting arrest (§ 148, subd. (a)(1)), and one count of misdemeanor being under the influence of a

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

controlled substance (Health & Saf. Code, § 11550, subd. (a)). The information further alleged that defendant suffered three prior strike convictions (§§ 667, subds. (b)-(j), 1170.12, subd. (b)) and three convictions for serious or violent felonies, such that he would need to serve any prison term in state prison (§§ 1170, subd. (h)(3), 667.5, subd. (c), 1192.7). Defendant pled not guilty and denied the allegations.

A jury found defendant guilty of all five charged offenses. Defendant waived his right to a jury trial on the allegations, and the court found true the two priors the prosecution attempted to prove.

The trial court sentenced defendant to an aggregate term of 14 years, 8 months in prison. It imposed the high term of six years on the first child endangerment count, doubled to 12 years due to defendant's strikes; one-third the midterm, 16 months, doubled to 2 years, 8 months, on the second child endangerment count, to run consecutively; and 364 days for each of the misdemeanors, to run concurrently to the principal term.

Defendant timely appealed.

FACTUAL BACKGROUND[2]

I. Prosecution Evidence

Maria Martinez (no relation to defendant) testified that she was driving in the area of Palmdale Boulevard and 10th Street East in Palmdale around 8:00 p.m. on July 28, 2017. While she was at the "busy intersection," a man standing on the corner

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[2]We provide only the factual background relevant to defendant's child endangerment convictions. Defendant admitted at trial that he resisted arrest and vandalized a patrol car by kicking out its window, and does not challenge those convictions or the under the influence conviction here.

about 24 feet away caught her attention. She identified the man in court as defendant. Martinez testified that defendant looked "uneasy," "appeared to be under the influence of something," and was pacing back and forth while moving his hands in front of his chest and talking to himself.

Martinez saw two children, a boy and a girl, standing across the street from defendant, near another man. The children appeared to be around five to seven years old. When the light turned green, the man near the children crossed the street without them. Defendant then crossed the street toward the children, who followed him as he continued down the street. Martinez called the sheriff's department because something about the situation "didn't look right" to her. "[B]ased on how [defendant] appeared," Martinez "wasn't sure if it was safe for the children to follow . . . somebody that might be under the influence of something or if the children should be with him or not."

Deputy sheriff Melvin Aquino testified that he responded to Martinez's call. When he arrived at the area of Palmdale Boulevard and 9th Street East, he saw someone matching the description Martinez had provided. Aquino identified that person in court as defendant. Aquino stopped his car near defendant and approached him on foot. Aquino noticed an odor of alcohol emanating from defendant. Defendant was "aggressive" and did not want to talk. Defendant walked away with two small children, who were crying.

As Aquino tried to explain to defendant why he was there, defendant told the children not to talk to the police and "pulled the children away by their arm [*sic*] and crossed the street. There was no crosswalk or lights." Aquino testified that the four-

or six-lane street was busy, since it was rush hour, and "cars had to stop to not run him over." Two or three cars came within "[a] couple feet" of defendant and the children, and had to stop "abruptly," as they were traveling at the "average speed limit" in excess of 25 miles per hour; there was no stop sign or light where defendant crossed the street. Aquino lost sight of defendant and the children after they crossed the street. On cross-examination, Aquino testified that at the time, he did not believe defendant had committed a crime and did not write a report of the encounter.

Approximately two hours later, at 10:40 p.m., Deputy Sheriff Cesar Vilanova and his partner, Deputy Jonsen, were on patrol in the area of Palmdale Boulevard and 10th Place East. Vilanova saw defendant walking north on 10th Place East. Defendant had two small children who looked about five years old with him. Vilanova thought it was "kind of bizarre that there were two small children walking at that time of night," especially since they were "a little bit of a distance behind the defendant," and "he wasn't holding them by their hands or anything." Vilanova decided to approach defendant to investigate.

As Vilanova drove the patrol vehicle toward defendant, defendant "began running northbound" and "[l]eft the kids behind." The children attempted to catch up, but were about 40 feet behind defendant. Vilanova followed defendant and caught up to him after about 50 to 60 feet; the children were still trailing behind. Vilanova exited his car "and began talking to him trying to figure out what was going on, why he was running, . . . whose children [they were]." The children caught up to defendant while Vilanova was talking to him.

Defendant told Vilanova that the children were his but was unable to state where he lived. Vilanova testified, "I don't know if he was unfamiliar with that area or he didn't live in the area, but he would point in different directions as to where he lived, was never really able to tell me a street, an address; or if, in fact, he lived in Palmdale." While he was talking with defendant, Vilanova observed several signs that led him to conclude defendant "most likely" was under the influence of a central nervous system stimulant. Defendant spoke very rapidly but "wasn't able to carry a conversation." He was "constantly clenching his jaw" and "would flail his body," and his pupils did not constrict in response to Vilanova's flashlight. Defendant also smelled of alcohol, though he did not exhibit any other signs of alcohol intoxication.

Vilanova talked to the children during the encounter. He learned that the boy was six and the girl was five. Vilanova observed that the boy "appeared to be weathered like out in the sun all day"; Vilanova observed redness in the whites of his eyes and around the bridge of his nose. "The little girl, same thing." Vilanova further noted that the girl "appeared she had been crying all day." Both children were dirty and told Vilanova they were hungry. At some point during Vilanova's conversation with the children, defendant yelled at them to run away and go home; the children began crying.

Three women came out of a nearby apartment building. Two of them, Shanita and Carol, said they recognized the children and brought out some food for them. The children ate the food quickly. They told Vilanova that defendant was their father and that they lived with him. Neither child knew where they lived, or where they were going that evening. They said

they were "just out running around." Vilanova noticed that the boy had a "small abrasion" about two inches long on his wrist. The boy told Vilanova he had sustained the wound earlier in the day as he jumped over a fence while running away from the police. The boy said the fence was taller than Vilanova, who estimated the fence to be about seven feet high. Vilanova made arrangements for the children to be transported to the Palmdale sheriff's station and transported defendant to the jail.

II. Defense Evidence

Defendant testified as the sole defense witness. He acknowledged that he had a criminal record and was on probation on July 28, 2017. On that day, he was out with his six-year-old son and five-year-old daughter. He was their custodial parent and had enrolled them in school earlier in the day. He was feeling "great" and "proud," because he "was taking care of business as best I can." The family lived in a two-bedroom apartment, and defendant provided the children with food and clean clothing that day. Defendant loved his children and was "very, very careful" with them. He did not believe he did anything to endanger them.

Defendant waited until the evening to take the children outside because it was very hot during the daytime. They were going to visit his acquaintances, Carol and Shanita, whom he expected to give them a ride home. Defendant had not been drinking that day and was not under the influence of any illegal drugs or prescription medicine.

Defendant first encountered sheriff's deputies when he was in an "alleyway" near Carol and Shanita's apartment building; he did not recall having an encounter with a deputy earlier that day and denied that he and the children previously ran away from a

deputy. Defendant explained that Martinez had misidentified him earlier in the day: "When the lady said that there was a guy pacing back and forth, that was an acquaintance. . . . He was just there across the street. I was with my children. I remember him coming across the street to help me with my children to cross the street. So that was not even me, the person that was pacing supposedly back and forth when Ms. Martinez supposedly made a call."

When defendant was near Carol and Shanita's building, he saw a vehicle with no lights on approaching the wrong way down the one-way alley. Defendant did not know how to react, so he ran. Because he taught his children "military" and "boy scout stuff," and often played "racing" with them, they "automatically" ran when he said to run. He never told his children not to talk to or run from police; their mother taught them that.

Defendant, who had had previous "unpleasant experiences" with law enforcement, was "confused" when the deputies approached him. They told him they were responding to a 911 call and asked him why he was running and putting his children in danger. They also told him they were going to take his children, while they were in earshot.

On cross-examination, defendant admitted that he was not permitted to drink alcohol or use drugs while on probation. Defendant denied suffering a conviction for attempted robbery, but ultimately stipulated to committing that and two other felony offenses.

DISCUSSION

I. Sufficiency of the Evidence

Defendant contends the evidence was insufficient to sustain the felony child endangerment convictions for two

reasons. First, he argues that the prosecution failed to prove that he exposed his children to circumstances likely to produce great bodily harm or death. Second, he argues that the prosecution failed to prove that he acted with criminal negligence. We conclude that sufficient evidence supports the convictions.

A. Standard of Review

"'When a defendant challenges the sufficiency of the evidence, "'[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."' [Citation.] . . . 'Although a jury must acquit if it finds the evidence susceptible of a reasonable interpretation favoring innocence, it is the jury rather than the reviewing court that weighs the evidence, resolves conflicting inferences and determines whether the People have established guilt beyond a reasonable doubt.' [Citation.] '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."'" (*People v. Casares* (2016) 62 Cal.4th 808, 823–824.)

B. Governing Law

Section 273a, subdivision (a) provides: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation

where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years."

The statute is intended to protect children from abusive situations in which the probability of serious injury is great. (*People v. Valdez* (2002) 27 Cal.4th 778, 784 (*Valdez*).) It prohibits both active conduct, such as directly assaulting a child, and passive conduct, such as endangering a child through extreme neglect. (*Ibid.*) "'The number and kind of situations where a child's life or health may be imperiled are infinite. . . . Thus, reasonably construed, the statute condemn[s] the intentional placing of a child, or permitting him or her to be placed, in a situation in which serious physical danger or health hazard to the child is reasonably foreseeable.' [Citation.]" (*People v. Hansen* (1997) 59 Cal.App.4th 473, 479.) The child need not actually suffer great bodily injury for the statute to be violated. (*Valdez*, *supra*, 27 Cal.4th at p. 784.)

The trier of fact determines whether the circumstances or conditions of the incident are such that great bodily injury is likely. (*People v. Clark* (2011) 201 Cal.App.4th 235, 245.) "[C]ircumstances and conditions a reasonable jury could consider include, but are not limited to, (1) the characteristics of the victim and the defendant, (2) the characteristics of the location where the abuse took place, (3) the potential response or resistance by the victim to the abuse, (4) any injuries actually inflicted, (5) any pain sustained by the victim, and (6) the nature and amount of force used by the defendant." (*Ibid.*, fn. omitted.) The term "likely" as used in section 273a, subdivision (a) "means a substantial danger, i.e., a serious and well-founded risk." (*People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204.)

"[C]riminal negligence is the appropriate standard when the act is intrinsically lawful, such as leaving an infant with a babysitter, but warrants criminal liability because the surrounding circumstances present a high risk of serious injury." (*Valdez*, *supra*, 27 Cal.4th at p. 789.) Criminal negligence is aggravated, culpable, gross or reckless conduct that so departs from that of the ordinarily prudent or careful person under the same circumstances as to be incompatible with a proper regard for human life. (*Id.* at p. 783.) A defendant may be found criminally negligent when a reasonable person in his or her position would have been aware of the risk involved; he or she need not have a subjective awareness of the risk. (See *id.* at pp. 783, 790.)

C. Analysis

1. Circumstances Likely to Produce Great Bodily Harm or Death

Defendant contends he did not expose his children to circumstances likely to produce great bodily harm or death. He emphasizes that he held his children's arms as he crossed the busy street, that the cars on the street were able to stop without hitting them, and that Aquino did not believe a criminal offense had occurred at the time. These contentions are not persuasive.

Taken in the light most favorable to the verdict, the evidence showed that defendant, while under the influence of an unknown substance or substances, grabbed his small children and crossed a busy street at dusk. Multiple cars stopped short to avoid the trio, who were not in a crosswalk or near a stop sign. The fact that the cars were able to stop is not relevant; traffic moving quickly through an area without a crosswalk or stop sign poses an objectively serious risk of substantial danger to

pedestrians. A reasonable jury could have concluded that the children's small statures made them even less visible to drivers, particularly when the children were not in control of their own movement or in a position to exercise safety precautions.

Defendant further argues that there was no evidence that the children faced a likelihood of substantial injury later that night, at the time of the encounter with Vilanova. We disagree. The evidence also showed that defendant allowed his hungry, sun-weathered small children to trail some 40 feet behind him on a dark street late at night. Even though the children did not know where they were going, defendant immediately abandoned them when an unknown vehicle approached. The children had to run at top speed to relocate their father, who was unable to respond to basic questions and demonstrated negligible concern for their safety. A reasonable jury could conclude that these circumstances also likely posed a well-founded risk of great bodily injury to the children.

At bottom, defendant contends that the convictions should not be upheld here because "[t]he circumstances here pale in comparison to cases where appellate courts have held that the defendant placed their [*sic*] children in danger of great bodily injury or death." He directs us to several cases which he accurately characterizes as having "extreme facts where the children faced dire circumstances." The existence of these more severe cases does not negate the dangerous nature of defendant's conduct here. "When we decide issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts." (*People v. Thomas* (1992) 2 Cal.4th 489, 516.) The pertinent question is whether a reasonable jury could conclude defendant willfully exposed his

children to circumstances likely to cause them bodily harm, not whether defendant's conduct was more or less egregious than that found sufficient in other cases involving different facts and circumstances.

2. Criminal Negligence

Defendant also argues there was insufficient evidence that he acted with the requisite mens rea of criminal negligence. He contends that his conduct was not incompatible with a proper regard for human life. At worst, he asserts, he made some parenting mistakes and was ignorant of the potentially adverse effects of his acts.

The evidence supports the jury's finding to the contrary. A reasonable person would be aware that dragging small children across a large, busy street outside of a crosswalk or near a stop sign is objectively dangerous. The danger was compounded by the time of day—dusk and rush hour—as well as defendant's altered mental state and the presence of swiftly moving cars in the immediate vicinity. A reasonable person similarly would be aware that leaving two young children alone on a dark street late at night with an oncoming car is reckless and presents a high risk of serious injury to them.

Defendant again emphasizes that he held onto his children—by their arms—and further asserts that there was no proof the children saw him use drugs, or that his altered state itself posed harm to them. Holding one's children by the arms while crossing a street in front of moving traffic makes at best a marginal reduction in the serious risk involved to the children. Likewise, even if defendant ingested a central nervous system stimulant outside his children's presence, that would not shield his children from the potentially hazardous effects of his

resultant poor decision-making.

II. Consecutive Sentences

We agree with the parties that the trial court erred in believing that it was required to impose consecutive sentences on the child endangerment counts. Absent an express statutory directive to the contrary, courts have the discretion to determine whether sentences for multiple convictions should be run concurrently or consecutively. (See § 669; *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262.) We agree that the statutory directives in sections 667, subdivisions (c)(6) and (c)(7) and 1170.12, subdivisions (a)(6) and (a)(7) are not applicable here.

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption that it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its discretion at a new sentencing hearing. [Citations.] Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) No remand is necessary, however, if the "record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion" in favor of concurrent sentences (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896), or there is "a clear indication that the court will not exercise its discretion in the defendant's favor" (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 427). (See also *People v. Coelho* (2001) 89 Cal.App.4th 861, 889 ["reviewing courts have consistently declined to remand cases where doing so would be an idle act that exalts form over substance because it is not reasonably probable the court would

impose a different sentence"].) The Attorney General argues that the record meets that standard here, and we agree.

The court told defendant, "Although I think you're an abysmal failure as a father, I think in your own way I do think you love your kids [*sic*]. I don't think you intentionally tried to hurt them, but your behavior was appalling to anybody that would have seen it to the point where an independent citizen called the police because they were worried about your kids." The court selected the high term on the first child endangerment count based on the threat of bodily harm his conduct posed, his callousness toward the children, the children's vulnerability, and his prior prison terms. The court emphasized that there were two separate victims when imposing sentence on the second count, which is a proper basis on which the court may impose a consecutive sentence. (*People v. Calhoun* (2007) 40 Cal.4th 398, 408.) The court also rejected defendant's request for a concurrent sentence on the probation violation for which he was getting resentenced: "I don't believe that's an appropriate resolution." The court's remarks and sentences clearly indicate that it would not exercise its discretion in defendant's favor when apprised of its discretion. Accordingly, the sentence is affirmed without remand.

DISPOSITION

The judgment of the trial court is affirmed.

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COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

MICON, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.